86-282

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

Supreme Court, U.S.
FILED
AUG 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

DREXEL BURNHAM LAMBERT, INC.,
CHARLES BEST, AND GEORGE WILMOT,

Petitioners,

vs.

REBECCA KING,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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43 pp

QUESTION PRESENTED

Whether petitioner's Motion to Compel Arbitration of respondent's claims under the Securities Exchange Act of 1934, 15 U.S.C. § 78(a) et. seq., should have been granted because the claims clearly fall within the scope of the Federal Arbitration Act and the arbitration clauses in the parties' agreements, and because of the Supreme Court's repeated affirmations of the strong federal policy of encouraging arbitration.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioners, Drexel Burnham Lambert, Inc., Charles Best, and George Wilmot, and the respondent, Rebecca King.

Corporate petitioner Drexel Burnham Lambert, Inc. has the following parent companies, subsidiaries and/or affiliates:

Drexel Burnham Lambert American Specialists Inc.

Drexel Burnham Lambert Commercial Paper Incorporated

Drexel Burnham Lambert Government Securities Inc.

Drexel Burnham Lambert International Bank N.V.

Drexel Burnham Lambert International Inc.

Drexel Burnham Lambert Limited

Drexel Burnham Lambert Management Corporation

Drexel Burnham Lambert Puerto Rico Inc.

Drexel Burnham Lambert Options Inc.

Drexel Burnham Lambert Securities Limited

Drexel Burnham Lambert Trading Corporation

Drexel Management Corporation

Harbor Trust Company

Kirchner Moore & Company

MaClaine, Watson & Company Limited

The Washington Forum, Inc.

Drexel Burnham Lambert Trade Finance Inc.

Drexel Burnham Lambert MRP Inc.

Drexel Burnham Lambert Realty Inc.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DREXEL BURNHAM LAMBERT, INC.,
CHARLES BEST, AND GEORGE WILMOT,

Petitioners,

v.

REBECCA KING,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioners, Drexel Burnham Lambert, Inc., Charles Best, and George Wilmot, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on May 28, 1986.

OPINIONS BELOW

The decision of the Court of Appeals for

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the Fifth Circuit has not been reported. It is reprinted in the appendix hereto, p. 21a, infra.

The decision of the United States District Court for the Northern District of Texas, Dallas Division, has not been reported. It is reprinted in the appendix hereto, p. 25a, infra.

JURISDICTION

Respondent brought this suit in the Northern District of Texas by invoking jurisdiction pursuant to 15 U.S.C. § 78(aa), the Securities Exchange Act of 1934. On October 29, 1985, the Northern District denied the petitioners' Motion to Compel Arbitration of respondent's claim under the Securities Exchange Act of 1934 (1934 Act). See p. 25a, infra.

The petitioners appealed to the Fifth Circuit, pursuant to 28 U.S.C. § 1292(a)(1), and in an unpublished opinion dated May 28, 1986, the Fifth Circuit ruled that parties to a written arbitration agreement could not

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compel arbitration of claims under the 1934 Act. See p. 21a, infra.

A suggestion for en banc hearing had been denied on April 22, 1986, and no petition for rehearing was filed.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portions of the Federal Arbitration Act, 9 U.S.C. §§ 2 and 3, are set forth at page 30a-31a of the Appendix.

The relevant portions of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78aa and 78cc(a), are set forth at page 32a-33a of the Appendix.

STATEMENT OF THE CASE

Respondent King established a brokerage account with petitioner Drexel in November of 1982. On or about December 13, 1982, respondent executed a Client's Option Agreement and Approval Form that stated, in part, that "[a]ny controversy arising out of or relating

to" her account or to transactions for her or out of "this agreement or the breach thereof shall be settled by arbitration...." See p. 34a, infra. On or about March 8, 1983, respondent executed a Customer's Agreement which stated, in part, that "[a]ny controversy...arising out of said account or relating to this contract or the breach thereof, shall be settled by arbitration...." See p. 35a, infra.

Respondent filed suit on May 15, 1985, asserting violations of both federal and state law in the handling of her brokerage account. On the day petitioners filed their Answer, June 19, 1985, they also filed a Motion to Compel Arbitration and to Stay Proceedings Pending Arbitration. Respondent filed a Response to the Motion to Compel Arbitration on July 1, 1985, asserting, in part, that federal securities claims are not arbitrable.

On October 29, 1985, the district court entered its Order granting in part and denying in part petitioner's Motion to Compel Arbitra-

tion. See, p. 25a. The court ruled that petitioner was entitled to arbitrate respondent's pendent state law claims but refused to order arbitration of her claim under the Securities Exchange Act of 1934. The district court stated that it was "hesitant" to disregard the Fifth Circuit decision in Sibley v. Tandy Corp., 543 F.2d 540 (5th Cir. 1976), cert. denied, 434 U.S. 824 (1977). Additionally, the court ruled that the parties did not intend to arbitrate 1934 Act claims because Paragraph 8 of the Client's Security Option Agreement states that "[n]othing in this paragraph shall in any way constitute a waiver or any limitation of any rights which I (we) may have under any Federal Securities law." Finally, the court refused to stay action on the federal securities claim pending arbitration of all other claims even though it recognized that these pendent state claims constituted the "lion's share" of respondent's complaint.

Petitioner appealed to the Fifth Circuit,

arguing that the Federal Arbitration Act requires arbitration, that the parties had an enforceable agreement to arbitrate all disputes, and that under the clear teachings of Mitsubishi Motors Corp. v. Soler Chrysler - Plymouth, Inc., 105 S.Ct. 3346 (1985), and Dean Witter Reynolds, Inc. v. Byrd, 105 S.Ct. 1238 (1985), claims under the Securities Exchange Act should be arbitrable.

The Fifth Circuit agreed with petitioner that respondent had agreed to settle through arbitration any controversy arising out of the handling of her account, but it declined to find the 1934 Act claim arbitrable. See, p. 23a. The court stated that the rule of the Circuit is clear that the doctrine of Wilko v. Swan, 346 U.S. 427 (1953), which holds invalid agreements to arbitrate claims under the Securities Act of 1933, is "equally applicable" to claims arising under the 1934 Act. The court noted that in Byrd, the Supreme Court had expressly declined to pass on the merits of the Circuit's rule, and

therefore, the Circuit's prior decisions on this issue retained their full authority as precedent. The Fifth Circuit did not acknowledge the Mitsubishi decision despite petitioner's reliance on it.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's refusal to allow arbitration of claims under the Securities Exchange Act of 1934 (a) violates the clear message of recent decisions of this Court and conflicts with a decision of the Eighth Circuit, and (b) violates the plain language of the Federal Arbitration Act.

In a series of cases culminating with the decisions in Dean Witter Reynolds, Inc. v. Byrd, 105 S.Ct. 1238 (1985), and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S.Ct. 3346 (1985), this Court has emphasized the importance of the Federal Arbitration Act and the breadth of its application. Despite this Court's pro-arbitration message, the Fifth Circuit has chosen to stand on precedent explicitly questioned by this Court and to refuse to allow arbitration of a claim under the Securities Exchange Act of 1934. The Circuit's continued application of Wilko v. Swan, 346 U.S. 427 (1953), to claims under the 1934 Act,

and the resulting conflict with the Eighth Circuit, merits this Court's attention.

I. The decision of the Fifth Circuit violates the plain message of this Court in Mitsubishi, Byrd, and other recent cases and conflicts with a decision of the Eighth Circuit.

The Fifth Circuit's summary rejection of arbitration and its refusal to even analyze the issue in light of this Court's recent cases were based on its overemphasis of the fact that in Byrd, the issue of the applicability of Wilko to 1934 Act claims was not ruled upon because it was not properly before the Court. 105 S.Ct. at 1240 n. 1. The Fifth Circuit's interpretation of this limit to jurisdiction was that "[t]he Supreme Court, in its most recent examination of the relevant arbitration principles [in Byrd] expressly declined to pass on the merits of our Circuit's rule" that Wilko applies to 1934 Act claims and arbitration therefore cannot be compelled. p. 23a, infra.

The Fifth Circuit's interpretation of Byrd ignores two critical facts. First, this

Court acknowledged, in its majority opinion, that the applicability of Wilko to a 1934 Act claim is questionable, as it had indicated in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), because of the differences between the 1933 and 1934 Acts and because the 1934 Act, unlike the 1933 Act, does not expressly provide a private cause of action. 105 S.Ct. at 1240 n. 1. Second, the Fifth Circuit decision ignores Justice White's concurring opinion, in which he elaborated on the significant differences between the two acts and stated that the conclusion that 1934 Act claims are not arbitrable is "a matter of substantial doubt" and that "Wilko's reasoning cannot be mechanically transplanted to the 1934 Act." Id. at 1244.

The Fifth Circuit's summary rejection of arbitration in this case is indisputably based upon a mechanical application of Wilko to the 1934 Act. The Circuit, through its reliance on its earlier decision in Sibley, premised its holding on an analogy to Section 14 of the

1933 Act, the non-waiver provision, and the 1933 Act's express private cause of action. Such reasoning must be rejected, however, because of the substantial differences in the two acts, particularly the lack of an express private right of action under the 1934 Act. As Justice White stated in his concurrence in Byrd:

> While § 29 of that [1934] Act, 15 U.S.C. § 78cc(a), is equivalent to § 14 of the 1933 Act...[j]urisdiction under the 1934 Act is narrower, being restricted to the federal courts. 15 U.S.C. § 78aa. More important, the cause of action under § 10(b) and Rule 10b-5...is implied rather than express.... The phrase "waive compliance with any provision of this chapter," 15 U.S.C. § 78cc(a) (emphasis added), is thus literally inapplicable. Moreover, Wilko's solicitude for the federal cause of action--the "special right" established by Congress...is not necessarily appropriate where the cause of action is judicially implied and not so different from the common law action.

105 S.Ct. at 1244. Justice White's analysis is further supported by the decision in Herman

& MacLean v. Huddleston, in which this Court explained that while the 1933 Act, with its "virtually absolute" liability against issuers of securities, places a "relatively minimal burden" on a plaintiff, the 1934 Act, although broader in scope because of the "'catchall' antifraud provision" of Section 10(b), places a heavier burden on a plaintiff by requiring him to prove that the defendant acted with scienter. 459 U.S. 375, 381-82 (1983). The Court then noted that although certain conduct may be actionable under both, the 1933 and 1934 Acts were intended to address different types of wrongdoing. Id. at 382-83.

These substantial differences in the acts, coupled with the strong federal policy favoring enforcement of arbitration agreement, prompted the Eighth Circuit to conclude that Wilko should not be extended to the 1934 Act. Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 85-5156, slip op. (8th Cir. July 9, 1986). The Eighth Circuit held that the "non-waiver provision of the 1934 Act,

section 29(a), simply does not overrule the Arbitration Act...when it is not buttressed by special rights and broad jurisdictional provisions similar to those found in the 1933 Act." Id. at 10.

Although the Eighth Circuit recognized the substantial differences between the 1933 and 1934 Acts, the Second Circuit, like the Fifth Circuit, has ruled that because of the similarity of the Acts, claims under the 1934 Act should be arbitrable. McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (2d Cir. 1986), petition for cert. filed, No. 86-44 (July 14, 1986). The McMahon decision, like that of the Fifth Circuit, frustrates the clear message of Mitsubishi, Byrd, and the other cases documenting this Court's evolution into a strong advocate of arbitration. It also errs in its glib statement that its reasoning in American Safety Equipment v. J. P. Maguire, 391 F.2d 821 (2d Cir. 1968), was not disputed in Mitsubishi, despite this Court's statement that "[a]t the outset we

confess to some skepticism of certain aspects of the American Safety doctrine" and the detailed rejection of the Second Circuit's analysis that followed. 105 S.Ct. at 3357-60.

This decision of the Eighth Circuit clearly represents a better view than the Fifth Circuit's mechanical application of questioned precedent or the Second Circuit's application of a rejected analysis. It squares with this Court's message in Byrd that the 1933 and 1934 Acts are significantly different, and it follows the holding in Mitsubishi that the Federal Arbitration Act should not be disregarded without strong evidence that Congress intended that it be disregarded. As this Court stated in Mitsubishi:

> Just as it is the congressional policy manifested in the federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to

> which agreements to arbitrate will be held unenforceable.
>
> . . .
>
> [I]f Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. See Wilko v. Swan, supra. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

105 S.Ct. at 3355.

The Fifth Circuit could not rely on any statutory preclusion of arbitration when it refused to enforce the arbitration agreement, because the claim under the 1934 Act is judicially implied. Instead, the court, through its reliance on Sibley, applied the Wilko doctrine to the 1934 Act because of the similarities the Circuit perceived in the 1933 and 1934 Acts. This reliance ignores this Court's repeated statements that the two acts are significantly different, and it conflicts

with the Eighth Circuit's decision in Phillips, in which the court concluded, relying on Justice White's concurrence in Byrd, that "Congress has not evinced an intention to preclude the waiver of judicial remedies for the section 10(b) and Rule 10b-5 rights at issue...." No. 85-5156, slip op. at 10. The Fifth Circuit decision, therefore, should be reversed by this Court.

II. The decision of the Fifth Circuit violates the plain language of the Federal Arbitration Act and wrongfully deprives parties of their statutorily protected contract rights.

The Federal Arbitration Act expressly provides that written agreement evidencing transactions in commerce "shall be valid, irrevocable and enforceable." 9 U.S.C. § 2 (emphasis added). This Court has ruled that in enacting the Federal Arbitration Act, Congress declared "a liberal federal policy favoring arbitration agreements" and that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be

resolved in favor of arbitration." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983). Nearly one year later, in Southland Corp. v. Keating, this Court reaffirmed the strong federal policy favoring arbitration, noting that the history of the Act makes it clear that Congress intended that it have a broad reach. 465 U.S. 1, 13 (1984). This same theme was reiterated in Byrd, in which this Court ruled that the Act, "through its plain meaning and the strong federal policy it reflects, requires courts to enforce the bargain of the parties to arbitrate." 105 S.Ct. at 1241. The Court then noted that the preeminent concern of Congress in enacting the Arbitration Act was to enforce the agreements of parties, and that concern "requires that we rigorously enforce agreements to arbitrate." Id. at 1243 (emphasis added).

It is impossible to reconcile the Fifth Circuit's terse rejection of arbitration with the plain, and mandatory, language of Sec-

tion 2 of the Act, or with this Court's recent rulings. Given that a major thesis of these decisions, particularly Mitsubishi, has been that courts cannot reject enforceable arbitration agreements based on their own interpretations of the Act and the policy it embodies, it is difficult to understand the Fifth Circuit's decision. As Mitsubishi makes clear, it was Congress that created the statutory right to arbitration, and until such time as Congress withdraws that right as it pertains to judicially implied causes of action, parties must be held to their bargains to arbitrate. The Fifth Circuit's decision, therefore, should be reversed.

CONCLUSION

The decision of the Fifth Circuit conflicts with the clear message of this Court in Mitsubishi, Byrd, and other recent cases evidencing the strong federal policy of rigorously enforcing the agreement of parties to arbitrate. The decision also conflicts with the Eighth Circuit decision, in Phillips, that claims under the 1934 Act should be ruled arbitrable under Mitsubishi and Byrd and pursuant to the plain language of the Arbitration Act. For these reasons, petitioner respectfully requests that this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

Edward S. Koppman, P.C.

A Member of the Bar of the Supreme Court and Counsel of Record for Petitioners Drexel Burnham Lambert, Inc., Charles Best, and George Wilmot.

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Patricia A. Nolan
Attorneys for Petitioners

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1717
Summary Calendar

REBECCA KING,

Plaintiff-Appellee,

versus

DREXEL BURNHAM LAMBERT, INC. ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

(May 28, 1986)

Before GEE and HIGGINBOTHAM, Circuit Judges, and HARVEY*/, District Judge.

GEE, Circuit Judge:**/

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*/ District Judge of the Eastern District of Michigan, sitting by designation.

**/ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Rebecca King established a brokerage account with Drexel Burnham Lambert, Inc. ("DBL") in 1982. When she did so, she agreed that any controversy arising out of the DBL's handling of her account would be settled by arbitration. King later became dissatisfied with DBL's performance and filed suit in the district court alleging violations of both federal and state law in the handling of her account. In response DBL filed an answer and a motion to compel arbitration and to stay proceedings pending arbitration.

The district court granted in part and denied in part DBL's motion; the court stayed all state claims and ordered arbitration pursuant to the arbitration agreement, but declined to compel arbitration of King's claim under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). DBL appeals the court's refusal to compel arbitration of the 1934 Act claims.

The rule in this Circuit is clear: The doctrine of Wilko v. Swan, 346 U.S. 427, 74

S.Ct. 182, 98 L.Ed. 168 (1958), which holds that any agreement to arbitrate claims arising under the Securities Act of 1933 is invalid, is equally applicable to claims arising under the Exchange Act of 1934. Sawyer v. Raymond James & Associates, Inc., 642 F.2d 791, 792 (5th Cir. 1981), citing Sibley v. Tandy Corp., 543 F.2d 540, 543 (5th Cir. 1976). The Supreme Court, in its most recent examination of the relevant arbitration principles, expressly declined to pass on the merits of our Circuit's rule. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. -, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) at n.5. Our decisions in Sawyer and Sibley retain their full precedential authority, authority we are obliged to follow. Smoky Greenhaw Cotton Co. v. Merrill, Lynch, Pierce, Fenner and Smith, Inc., 785 F.2d 1274, 1275 n.1 (5th Cir. 1986).

Given the rule of this Circuit, the district court's denial of the Motion to Compel Arbitration of the 1934 Act claims was correct. We therefore AFFIRM the ruling of

the court below and DISMISS the interlocutory appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

REBECCA KING	§	
	§	
VS.	§	
	§	
DREXEL BURNHAM	§	NO. CA3-85-0932-F
LAMBERT INCORPORATED,	§	
CHARLES BEST and	§	
GEORGE WILMOT	§	

O R D E R

Pending consideration is Defendants' motion to stay proceedings and compel arbitration and Plaintiff's motion to compel production of documents sought in the regular course of discovery. For the reasons that follow, Defendants' motion will be granted in part and denied in part; Plaintiff's motion will be denied without prejudice.

Plaintiff is an investor in securities who seeks to recover losses in her account from the broker and his firm by alleging violations of the securities laws and

various state law provisions. By virtue of an arbitration clause contained in Plaintiff's Client Option Agreement, however, Plaintiff agreed to arbitrate any controversy arising out of or relating to her account. Recent Supreme Court precedent mandates this court give binding effect to such an arbitration agreement and compel arbitration of at least the pendent state law claims. Dean Witter Reynolds, Inc. v. Byrd, _____ U.S. _____, 105 S.Ct. 1238 (1985). Therefore, the Court will compel arbitration of Plaintiff's 2nd, 3rd, 4th and 5th causes of action set forth in her first amended complaint filed May 28, 1985.

Even though Defendants urge the Court to compel arbitration of Plaintiff's first claim which alleges violations of the Securities Exchange Act of 1934, the Court declines. Certainly the Byrd decision casts substantial doubt on the viability of earlier Fifth Circuit case law (e.g. Sibley v. Tandy Corp., 543 F.2d 540 (5th Cir.

1976)) which refused to compel arbitration of 1934 Act claims. In fact, Justice White's concurring opinion in Byrd, 105 S.Ct. at 1244, has been cited and relied upon by district courts in the Fifth Circuit as grounds for refusing to follow Sibley. Defendants cite several such district court decisions in their brief in support of the motion to compel arbitration. The Court is hesitant to follow such a course, however, in the instant case.

The Court notes there is additional arbitration language contained in Paragraph 8 of the Client's Security Option Agreement. That particular paragraph expressly states, "Nothing in this paragraph shall in any way constitute a waiver or limitation of any rights which I (we) may have under any Federal Securities laws." The record in this case, therefore, indicates the parties did not intend to compel arbitration of the 1934 Act claims and the Court will not do so.

Even though the lion's share of Plaintiff's complaint is to be arbitrated, the Court will not stay proceedings on the federal securities claim. The Supreme Court in Byrd found no persuasive reason to stay the federal claim while compelling arbitration of the pendent state claims despite the resulting piecemeal resolution of the disputes. Accordingly, insofar as Defendants seek to stay the federal action, the motion will be denied.

Because Defendants were apparently relying on their pending motion to compel arbitration in their refusal to provided discovery, the Court will afford them an opportunity to respond to Plaintiff's discovery requests before compelling production. Therefore, Plaintiff's motion to compel will be denied without prejudice to being reurged after Defendants' response. Accordingly, it is hereby

ORDERED that Defendants' motion to compel arbitration is GRANTED as to Plaintiff's

2nd, 3rd, 4th and 5th claims and DENIED as to Plaintiff's 1934 Act claim in count 1. It is further ORDERED that Defendant's motion to stay is denied; it is further ORDERED that Defendants shall respond to Plaintiff's discovery requests within 20 days of Plaintiff's motion to compel; it is further ORDERED that Plaintiff's motion to compel production is denied without prejudice.

Signed and entered this 29th day of October, 1985.

ROBERT W. PORTER
UNITED STATES DISTRICT
JUDGE

APPENDIX C

PERTINENT PROVISIONS OF FEDERAL ARBITRATION ACT

9 U.S.C. § 2 Validity, irrevocability, and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3 Stay of proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the

court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

APPENDIX D

PERTINENT PROVISIONS OF SECURITIES EXCHANGE ACT OF 1934

§ 78aa. Jurisdiction of offenses and suits

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdictions of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder.

Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such

chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant of wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

§ 78cc. Validity of contracts

(a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

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APPENDIX E

PERTINENT PROVISIONS OF ARBITRATION AGREEMENTS

Client's Option Agreement and Approval Form

8. Any controversy arising out of or relating to my (our) account or transactions with you for me (us) or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the American Arbitration Association or the Board of Governors of the New York Stock Exchange, Inc., or the American Stock Exchange, Inc., as I (we) may elect. If I (we) do not make such election, by registered or certified mail addressed to you at 60 Broad Street, New York, N.Y. 10004, Attn: Legal Dept., within five (5) days after demand by you that I (we) make such election, then you may make such election. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

ABLE COPY

Customer's Agreement

Sixteenth: Any controversy between you and the undersigned arising out of said account or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of the American Arbitration Association, the New York Stock Exchange, Inc., the American Stock Exchange Inc., or the National Association of Securities Dealers, Inc., as the undersigned may elect. If the undersigned does not make such election, by registered or certified mail addressed to you at 60 Broad Street, New York, N.Y. 10004, Attn: Legal Dept., within five (5) days after demand by you that the undersigned make such election, then you may make such election. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof....

Supreme Court, U.S.
FILED
SEP 24 1986
JOSEPH F. SPANIOL, JR.
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NO. 86-282

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DREXEL, BURNHAM LAMBERT, INC., CHARLES BEST AND GEORGE WILMOT,

Petitioners

vs.

REBECCA KING

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Drexel's Statement of the Issues does not give full consideration to the very distinct nature of the two issues presented, which are:

1. Whether the arbitration agreement at issue excludes 1934 Act claims by its terms, and
2. If it includes such claims, whether the "nonwaiver" provisions of the 1934 Act preclude arbitration of claims brought under it.

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NO. 86-282

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DREXEL, BURNHAM LAMBERT, INC., CHARLES BEST AND GEORGE WILMOT,

Petitioners

vs.

REBECCA KING

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Respondent, Rebecca King, respectfully requests that the Court deny the Petitioners' request for Writ of Certiorari for the following reasons:

STATEMENT OF THE CASE

King does not agree that the Fifth Circuit ruled on the contract interpretation issue that provides an independent ground for upholding the Trial Court's ruling in this case. (see, Petition p.6) That issue was not discussed.

The Petition also slights this issue by failing to quote the entire pertinent provision of the arbitration clause, which reads as follows:

> Any controversy arising out of or relating to my (our) account or transactions with you or me (us) or to this agreement or the breach thereof, shall be settled by arbitration . . .
>
> Certain decisions of the federal courts have held that, if a dispute involves a claim arising under the Securities Act of 1933 or the Securities Exchange Act of 1934, such arbitration clauses are void and

unenforceable as applied to such claims and accordingly clients cannot be compelled to arbitrate such a claim. In other contexts, the courts generally enforce arbitration clauses in clients' agreements. Therefore, nothing in this paragraph shall in any way constitute a waiver or limitation of any rights which I (we) may have under any Federal Securities Laws.

SUMMARY OF ARGUMENT

The disposition of this case may turn not on the "Question Presented" in the Petition, but on an issue of contract interpretation. That issue does not satisfy the criteria for review by certiorari of this Court.

ARGUMENT

It is not appropriate to grant the Writ of Certiorari in this case because its outcome may not turn on the "Question Presented" described in the Petition. It may instead turn on a question of contract interpretation important only to the particular parties of this case.

In the Order denying arbitration entered by the Trial Court, Judge Porter relied principally upon contract interpretation rather than statutory interpretation. In fact, his ruling is based on his finding that:

> the record in this case, therefore, indicates the parties did not intend to compel arbitration of the 1934 act claim . . .

A fair reading of the entire Order is that Judge Porter declined to rule on the more

abstract issue of the arbitrability of 1934 Act claims because he could base his ruling on the construction of the particular arbitration clause in question.

Although the Fifth Circuit did not discuss the contract interpretation issue, there is nothing to show that it disagreed with Judge Porter's finding. Naturally, the Respondent in this case will continue to urge that finding as a ground for upholding the decisions of the Trial Court and the Fifth Circuit. She is entitled to advance any ground in support of the judgment appealed from. Trans-World Airlines, Inc. v. Thurston, 105 S. Ct. 613, 620-621, n.14 (1985).

Regardless of any decision concerning the arbitrability of 1934 Act claims,

this case cannot be decided without also deciding the contract interpretation issue. That issue is ultimately dispositive of the case, but satisfies none of the criteria described in Rule 17.1 of this Court's Rules. For that reason, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Because the contract interpretation issue may dispose of this case, the kind of issue suitable for a writ of certiorari is not clearly presented and the writ should be denied.

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